STATE OF MICHIGAN

IN THE SUPREME COURT

THE ESTATE OF MARGARETTE F. EBY, Deceased, by its Personal Representative, DAYLE TRENTADUE,

Plaintiff-Appellee,

v.

MFO MANAGEMENT COMPANY,

Defendant-Appellant,

and

BUCKLER AUTOMATIC LAWN SPRINKLER COMPANY, SHIRLEY GORTON, LAURENCE W. GORTON, JEFFREY GORTON, VICTOR NYBERG, TODD MICHAEL BAKOS, and CARL L. BEKOFSKE, as Personal Representative of the Estate of RUTH R. MOTT, Deceased,

Defendants.

Docket Nos. 128623, 128624, 128625

Court of Appeals Nos. 252155, 252207, 252209

Genessee County Circuit Court
Case No. 02-074145-NZ

Submitted by:

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AMICUS CURIAE REPLY BRIEF ON BEHALF OF MICHIGAN ELECTRIC AND GAS ASSOCIATION

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STATEMENT OF BASIS OF JURISDICTION

Michigan Electric and Gas Association supports the position espoused by Defendant-Appellant, MFO Management; and is filing this *amicus curiae* brief within the time frame allowed for Defendant-Appellant to reply to the response briefs. MCR 7.306(C) and (D).

STATEMENT OF QUESTION PRESENTED

IS THE JUDGE-MADE DISCOVERY RULE CONTRARY TO MCL 600.5827?

The Court of Appeals Answered, "No"
Defendant-Appellant Answered, "Yes"
Plaintiff-Appellee Answered, "No"
Amicus Curiae State Bar of Michigan Negligence Section Answered, "No"
Amicus Curiae Goldberg, Persky & White, P.C. Answered, "No"
Amici Curiae Consumers Energy and Michigan Electric and Gas Association Answer, "Yes"

STATEMENT OF FACTS

Amicus Curiae, Michigan Electric and Gas Association, accepts the Statement of Facts asserted by Defendant-Appellant, MFO Management.

DESCRIPTION OF THE *AMICI CURIAE*

Michigan Gas and Electric Association is an association of investor owned electric and gas public utilities providing service in Michigan, including Alpena Power Company, Aurora Gas Company, Citizens Gas, Edison Sault Electric Company, Michigan Gas Utilities, Indiana Michigan Power Company, Upper Peninsula Power Company, Wisconsin Public Service Corporation, We Energies and Xcel Energy.

ARGUMENT

The Judge-Made Discovery Rule is Contrary to MCL 600.5827

In granting leave, this Court asked the parties to address two issues of keen importance to the jurisprudence in this state: (1) whether the application of the discovery rule to this case by the Court of Appeals was inconsistent with and contravened MCL 600.5827, and (2) whether this Court should overrule its prior decisions recognizing and applying such a rule when MCL 600.5827 would otherwise control.

The Michigan Legislature did not include a discovery rule in MCL 600.5827, as it did in other statutes of limitations (including one mentioned in MCL 600.5827). Michigan courts cannot allow plaintiffs to circumvent the plain language of MCL 600.5827 as passed by Michigan Legislature by taking advantage of a judge-made discovery rule to file otherwise stale claims.

1. The Plain Language of MCL 600.5827 Does Not Include Any Discovery Rule, Unlike Other Statutes of Limitations Enacted by the Michigan Legislature:

As can clearly be seen, the Michigan Legislature did *not* include any discovery rule when it enacted MCL 600.5827:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections *the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.*

(Emphasis added). In other statutes of limitations, however, the Legislature *did* explicitly include discovery rules, demonstrating that it knows how to incorporate such rules if it desires. MCL 450.1489(f) (shareholder actions), 450.4515(e) (actions against limited liability companies), 600.5833 (breach of warranty of quality or fitness), 600.5838 (professional malpractice)[1], 600.5838a

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[1]This Court should reject Plaintiff-Appellee's argument that by enacting a six-month discovery rule in MCL 600.5838 and .5838a, the Legislature "embraced the discovery rule [in

(medical malpractice); 600.5839 (building defects); 600.5855 (fraudulent concealment). Where the plain language is clear and unambiguous, courts cannot subject substantive statutes of limitations to "tortured readings" in order to preserve a right to sue without violating the legitimate public policy underlying such statutes. *Gladych v New Family Homes, Inc*, 468 Mich 594, 600; 664 NW2d 705 (2003).[2] Because the Michigan Legislature did not specifically include a discovery rule in MCL 600.5827, but it did so in other statutes of limitations, the Legislature clearly intended that no judge-made discovery rule should trump MCL 600.5827.

2. This Court Has Recently Focused and Relied on the Plain Words of Statutes of Limitations:

Early Michigan cases barred plaintiffs from relying on judge-made discovery rules when they were not explicitly included in relevant statutes of limitations. *Ramsey v Child, Hulswit & Co*, 198 Mich 658, 667; 165 NW 936 (1917); *Thatcher v Detroit Trust Co*, 288 Mich 410; 285 NW 2 (1939).

However, later decisions permitted plaintiffs to invoke the discovery rule, based on the Court's views on public policy despite the absence that rule in the text of the statutes of limitations.[3]

MCL 600.5827] with its silence." Plaintiff-Appellee's Brief, Case No. 128579, at 15-17 and 24-26. To the contrary, the Legislature recognized that certain types of cases, such as professional malpractice, require a brief discovery rule. Its failure to add such a rule to MCL 600.5827, even while citing MCL 600.5838, demonstrates that the Legislature did not want a general discovery rule for all actions involving covered by MCL 600.5827, but only professional malpractice.

[2]The public policy underlying statutes of limitations include "the prompt recovery of damages, penalizing plaintiffs who are not industrious in pursuing claims, security against stale demands, relieving defendants' fear of litigation, prevention of fraudulent claims, and a remedy for general inconveniences resulting from delay...." *Gladych, supra*, citing *Nielsen v Barnett*, 440 Mich 1, 8-9; 485 NW2d 666 (1992).

[3]*See*, for example, *Johnson v Caldwell*, 371 Mich 368, 378-379; 123 NW2d 785 (1963) [no mention of due process]; *Connelly v Paul Ruddy's Equipment Repair & Service Co.*, 388 Mich 146, 150; 200 NW2d 70, 72 (1972) [tacitly modifying the term "wrong" in MCL 600.5827 with "actionable," but not mentioning due process]; *Dyke v Richard*, 390 Mich 739, 747; 213

In the 1990's, this Court began to reign in the discovery rule, while not abrogating it.[4] Recently, and seemingly anticipating a general rejection of judicially-created discovery rules in derogation of the plain language of statutes of limitations, this Court precluded plaintiffs from using the discovery rule to avoid the statute of limitations for fraud since no discovery rule was included in the applicable statute of limitations. *Boyle v General Motors Corp*, 468 Mich 226, 231-32; 661 NW2d 557 (2003) [citing, *inter alia*, the plain language of MCL 600.5827]. This Court has also adhered to the plain language of statutes of limitations to prevent plaintiffs from otherwise avoiding their consequences. *Garg v Macomb County Mental Health Services*, 472 Mich 263, 284-85, n 10; 696 NW2d 646 (2005) (construing *Boyle* broadly, abolishing the nearly twenty years-old *Sumner* "continuing violations" doctrine, and rejecting call to retain that doctrine due to *stare decisis*)[5]; *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 581-82; 473 NW2d 562 (2005) (rejecting judicial relaxation of the statute of limitations via equitable tolling, and stating: "Statutory ... language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of this Court."). Two courts have

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NW2d 185 (1973) [implying due process required discovery rule for medical malpractice cases]; *Williams v Polgar*, 391 Mich 6, 25, n 18; 215 NW2d 149 (1974) [negligent misrepresentation]; *Larson v Johns-Manville*, 427 Mich 301; 399 NW2d 1 (1986) [asbestos exposure]; *Moll v Abbott Laboratories*, 444 Mich 1, 16; 506 N.W.2d 816 (1993) [products liability]; *Chase v Sabin*, 445 Mich 190; 516 NW2d 60 (1994) [medical malpractice].

[4]*Lemmerman v Fealk*, 449 Mich. 56; 534 N.W.2d 695 (1995) [denying extension of time to bring suit due to repressed memory]; *Stephens v Dixon*, 449 Mich 531, 534-535; 536 NW2d 755 (1995) [refusing to extend rule to plaintiff who knew of injury, but not severity of it, outside limitations period]; *Solowy v Oakwood Hosp. Corp.*, 454 Mich 214; 561 NW2d 843 (1997) [holding that the discovery rule applies to discovery of an injury, not to the discovery of a later realized consequence of the injury].

[5]The *Garg* Court included the *Boyle* decision among its rejection of "similar attempts to modify statutes of limitations" since 2000. *Id*, at 472 Mich 287, n 12.

concluded that *Boyle* abolished Michigan's judge-made discovery rule. *Riverside Auto Sales, Inc v GE Capital Warranty Corp*, 2004 US Dist Lexis 18965 at *11-12 (WD Mich, 2004) [Ex. A][6]; *In re Webb Trust*, 2006 Mich. App. Lexis 209 at *9-10[Ex. B].[7]

Accordingly, this Court should continue its laudable trend of enforcing the plain language of statutes of limitations and rejecting judicial legislation allowing plaintiffs to circumvent them.

3. Other States Have Abrogated the Discovery Rule:

Other states have rejected discovery rules not expressly contained in statutes of limitations, particularly where the legislature included the discovery rule in other statutes. In addition to those cases cited by Defendant-Appellant, MFO Management on pages 22-23 of its Brief on Appeal, see, also, *Bunker v Nat'l Gypsum Co.*, 441 NE2d 8, 11-14 (Ind S Ct, 1982) [finding 3-year statute of limitations running from date of last toxic exposure constitutional].

4. Judicially-Created Equitable Remedies Which Allow Plaintiffs to Circumvent the Statute of Limitations Violate the Doctrine of Separation of Powers:

Where the Legislature has spoken, as it did in MCL 600.5827 by *not* including any explicit general discovery rule in the statute, judicially-created equitable remedies that allow plaintiffs to circumvent the plain language of the statute violate the doctrine of separation of powers found in Const 1963, art 3, § 2, because courts have usurped the role of the Legislature. *Garg v Macomb*

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[6]Judge Quist wrote: "A claim does not accrue when it is or should have been discovered. See *Boyle v. Gen. Motors Corp.*, 468 Mich. 226, 230-32, 661 N.W.2d 557, 559-60 (2003) (noting that the 'discovery rule' has been rejected in Michigan)."

[7]The *Webb* court stated: "Although *Boyle* involved a fraud claim, the principle applies here as well: the language of MCL 600.5827 is clear and unambiguous that a claim accrues when the wrong is committed, not when it is discovered, unless it falls within §§ 5829 to 5838. Thus, ... the proper test for determining when petitioner's claim for breach of fiduciary duty accrued is not when he knew or should have known of the alleged breach, but when the alleged wrong was committed, causing the alleged harm."

County Mental Health Services, 472 Mich 263, 284-85, ns 10 and 12; 696 NW2d 646 (2005); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 588-91; 473 NW2d 562 (2005).[8] To the extent that others disagree with the wisdom or reasonableness of the absence of a discovery rule related to particular types of cases, such as those allegedly involving latent injuries, those concerns should properly be addressed to the Michigan Legislature rather than the courts.[9]

5. Legislative Silence After Some Decisions Recognized the Discovery Rule is Irrelevant:

The fact that the Michigan Legislature did not amend MCL 600.5827 after this Court applied the discovery rule in some cases does not mean that it acquiesced in the correctness of those decisions. This Court has emphatically rejected the legislative acquiescence doctrine and rightly focused on the plain meaning of the actual language of statutes when they were enacted. *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999) ("'[L]egislative acquiescence' is a highly disfavored doctrine of statutory construction; sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its words, not from its silence."); *Robertson v Daimlerchrysler Corp*, 465 Mich 732, 760, n 15; 641 NW2d 567 (2002) ("[T]he dissent's 'legislative acquiescence' argument is merely another way of sustaining forever

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[8]*See*, also, by analogy, *Crown Tech Park v D&N Bank, FSB*, 242 Mich App 538, 548-49, n 4; 619 N.W.2d 66 (2000), *lv den*, 463 Mich 1014, 626 NW2d 413 (2001) (suggesting that violation of separation of powers would occur if plaintiff could use judicially-created doctrine of promissory estoppel to circumvent the statute of frauds).

[9]*See*, for example, *Pendzsu v Beazer East, Inc*, 219 Mich App 405, 414; 557 NW2d 127 (1996), *lv den*, 457 Mich 872; 586 NW2d 918 (1998) [in upholding statute of repose in asbestosis claim against contractor, court stated that "any inequity that this statute imposes on victims of asbestos-related diseases must be addressed to the Legislature."]. The Legislature could properly lift any statute of limitations and allow such plaintiffs to bring suit even if their claims became time-barred by this Court's determination that the discovery rule should not apply to cases otherwise covered by MCL 600.5827. *Pryber v Marriott Corp*, 98 Mich App 50, 54-57; 296 NW2d 597 (1980), *aff'd*, 411 Mich 887, 307 NW2d 333 (1981).

any precedent, no matter how wrongly decided. Such an 'acquiescence' argument ... would accord greater weight to the silence of a subsequent Legislature than to the actual product of the Legislature that enacted a law."); *People v Anstey*, 476 Mich 436; 719 NW2d 579, 585 (2006) ("[N]either 'legislative acquiescence' nor the 'reenactment doctrine' may 'be utilized to subordinate the plain language of a statute.'"); and *Paige v City of Sterling Hts*, 476 Mich 495, 516-17; 720 NW2d 219 (2006) ("[T]he doctrine of legislative acquiescence is not recognized in this state....").[10]

6. Due Process is Not Violated if the Common Law Discovery Rule is Abrogated:

Plaintiff/Appellee cites *Dyke v Richard*, 390 Mich 739, 747; 213 NW2d 185 (1973) for the proposition that due process requires a discovery rule, at least for medical malpractice limitation periods.[11] The thirty-three year-old *Dyke* decision is, however, of little precedential value for several reasons:

- First, the *Dyke* majority cited no case law supporting the proposition that constitutional due process requires a discovery rule.[12]

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[10]*See*, also, *Hanson v Bd of County Rd Comm'rs*, 465 Mich 492, 501-02, n 7; 638 NW2d 396 (2002); *People v Hawkins*, 468 Mich 488, 507-08; 668 NW2d 602 (2003); *Neal v Wilkes*, 470 Mich 661, 668, n 11; 685 NW2d 648 (2004); *Devillers v Auto Club Ins. Ass'n*, 473 Mich 562, 592, n 66; 702 NW2d 539 (2005); *Grimes v MDOT*, 475 Mich 72, 84, n 40; 715 NW2d 275 (2006).

[11]Justices Brennan and Coleman dissented, based on the majority's reading a discovery rule into a statute that had none. *Dyke*, 390 Mich at 748-50. Justice Brennan asserted that this was "an unwarranted interference with the power of the Legislature," and argued "the Legislature does have the power to declare the time within which rights must be discovered, as well as asserted, and judicial disagreement with the wisdom of such policy does not justify nullification of the statute." *Id.* Justice Coleman called the majority opinion "a clear case of judicial legislation," and stated that the Court should not rewrite legislation it felt was unwise. *Id.*

[12]The *Dyke* majority only cited *Price v Hopkin*, 13 Mich 318, 324 (1865), and then only for the notion that statutes of limitation should "afford a reasonable time within which suit may be brought." *Price*, however, did not even involve the discovery rule. Rather, the issue addressed there was a shortening of a limitations period from 20 to 15 years, without any grace period,

- Second, since *Dyke*, other courts have ruled that due process does not require that all statutory limitations periods begin to run when the plaintiff discovers that a cause of action exists, rather than when the wrong occurred, even though in some instances, the statutory period may have run prior to discovering that a cause of action exists.[13] Indeed, in *O'Brien v Hazelet & Erdal*, 410 Mich 1, 15-16; 299 NW2d 336 (1980), this Court rejected a due process claim regarding the six-year statute of limitations in MCL 600.5839(1).

- Third, in light of *Boyle*, this Court implicitly rejected a due process claim when it held that plaintiffs who do not discover fraud within six years of the wrong cannot bring suit.

Accordingly, the majority opinion in *Dyke* should not deter this Court from determining that due process does not require any general discovery rule be applied to MCL 600.5827 in order for that statue to pass constitutional muster.

7. This Court Can and Should Resolve the Continued Validity of the Judge-Made Discovery Rule in This Case:

In an effort to dissuade this Court from even considering a general challenge to the discovery rule, Plaintiff-Appellee suggests that MCL 600.5827 is inapplicable to this case, arguing that it is, instead, governed solely by MCL 600.5805(10). Plaintiff-Appellee' Brief in Case No. 128579, p. 4-7. However, in *Joliet v Pitoniak*, 475 Mich 30; 715 NW2d 60 (2006), this Court held that *both*

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thereby eliminating all causes of action accruing more that 15 years before the effective date of the new statute of limitations.

[13]*Lumber Village, Inc v Siegler*, 135 Mich App 685, 355 NW2d 654 (1984); *Jewson v Mayo Clinic*, 691 F2d 405, 411-412 (CA 8, 1982); *Mathis v Eli Lilly & Co*, 719 F2d 134; 141 (CA 6, 1983); *Pierce v BP Chems*, 1993 U.S. App. LEXIS 25519 (CA 6, 1993) [Ex. C – In affirming limitations-based summary judgment, for which cause of action Virginia did not provide a discovery rule, court rejected due process claim and stated: "Although we recognize that this rule may, in cases such as this, produce harsh and inequitable results and may be difficult of application, we agree that the remedy lies with the Virginia legislature or supreme court."]; *Bunker v Nat'l Gypsum Co, supra*; *Ciccarelli v Carey Canadian Mines, Ltd*, 757 F.2d 548, 555 (CA 3, 1985); *Braswell v Flintkote Mines, Ltd*, 723 F2d 527, 529-31 (CA 7, 1983), *cert den*, 467 US 1231, 104 S Ct 2690, 81 L Ed 2d 884 (1984); *Douglas v Hugh A Stallings, MD, Inc*, 870 F.2d 1242, 1249-50 (CA 7, 1989).

statutes applied, finding that MCL 600.5805(9) [now MCL 600.5805(10)] provided "that plaintiff's claims must be brought within three years of the date the claims accrued," and that pursuant to MCL 600.5827, "accrual under the three-year statute of limitations is measured by 'the time the wrong upon which the claim is based *was done* regardless of the time when the damage results.'" *Id.*, at 475 Mich 36, n 10 (emphasis in original). This Court then ruled that "plaintiff's claims are barred by the statute of limitations unless they were brought within three years of the date the claims accrued, which is *the date of the alleged wrongdoing*." *Id.* (emphasis added).[14] Accordingly, this Court should reject the contrived effort to avoid consideration of how the judicially-created discovery rule violates the plain language of MCL 600.5827, and decide the issue now.

8. If This Court Holds That the Discovery Rule Contravenes MCL 600.5827, Then This Court Should Apply its Decision Retroactively to Pending Cases:

Contrary to the reply briefs of Plaintiffs/Appellees and other *amici curiae*, and as discussed above, there is no long unwavering history of the application of the common law discovery rule:

- The plain language of MCL 600.5827, enacted in 1963, explicitly states that, with certain exceptions, a cause of action begins to accrue at the time of the wrong upon which the claim was based. MCL 600.5827 clearly does not include a discovery rule.
- As explained previously, Michigan courts initially declined to adopt the common law discovery rule. *See Thatcher* and *Ramsey, supra.*
- Then the Courts began to apply a judge-made discovery rule, though only in limited circumstances and over dissent.

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[14]The *Joliet* Court stated: "Here, pursuant to the text of MCL 600.5827, plaintiff's claims accrued at the time the wrongs on which her claims are based were committed, not when she suffered damage. Thus, the relevant date for the period of limitations is not plaintiff's last day of work, but the date of the last discriminatory incident or misrepresentation.... Accordingly, we overrule the accrual analysis of *Jacobson* because it is inconsistent with our opinion in *Magee* and with the plain language of the statute of limitations under the WPA and the CRA." *Id*, at 475 Mich 41.

- More recently, in *Boyle*, *Garg*, and *DeVillers* (among other cases), this Court has returned to a more textual statutory interpretation, and demonstrated that it is loathe to provide equitable relief to plaintiffs in contravention of the plain language of statutes of limitations.

Accordingly, if this Court precludes plaintiff from relying upon the discovery rule in this case, then its decision should apply with at least limited retroactivity.

"The general rule is that judicial decisions are given complete retroactive effect." *Lesner v Liquid Disposal, Inc.*, 466 Mich 95, 108; 643 NW2d 553 (2002). However, if the court's decision overrules prior case law, then its decision will have limited retroactive effect and will only apply to pending cases that have specifically raised and preserved the issue. *Wayne v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004); *Gladych, supra*; *Lesner, supra*. In determining whether a decision will have limited retroactive application courts consider: (1) the potential effect of a retroactive decision; (2) the extent of reliance on the old rule; and (3) the effect of retroactivity on the administration of justice. *Lesner, supra*; *Gladych, supra*; *Mich Educ Employees Mut Ins Co v Morris*, 460 Mich 180; 598 NW2d 142 (1999).

As in *Lesner* and *Gladych*, the Courts's abandonment of the judge-made discovery rule would return the law to the plain statutory language of MCL 600.5827.[15] Michigan Supreme Court cases has already all but abandoned the judge-made discovery rule because it is contrary to governing statutes, meaning that this Court's ruling would not really amount to announcing a new rule. In *Gladych, supra*, this Court similarly gave limited retroactive application when it corrected a prior erroneous interpretation of the plain language in a statute of limitations in MCL 600.5856. The

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[15]In *Devillers*, this Court also gave limited retroactivity for its ruling on the "one year back" limitation of MCL 500.3145(1) to other pending cases raising the same issue, because the "decision ... is not a declaration of a new rule, but a return to an earlier rule and a vindication of controlling legal authority." *Devillers, supra* at 473 Mich 587.

Legislature has the power to vitiate any impacts it considers to be unfair to, for instance, those who suffer from long, pre-illness latency periods after exposure to toxins. For all these reasons, this Court should apply its decision retroactively to pending cases.

On the other hand, prospective application is an extreme measure and a departure from the usual rule. *Hathcock, supra*. Prospective application is limited to instances, unlike this case, where the decision overrules "clear and uncontradicted case law" or in "exigent circumstances." *Devillers, supra*; *Hathcock, supra*; *Morris, supra*. Further, this Court has questioned whether it is constitutionally legitimate "to render purely prospective opinions, as such rulings are, in essence advisory opinions." *Hathcock, supra* at 471 Mich 484, n 98; *Devillers, supra* at 473 Mich 587, n 57. Accordingly, it would not be appropriate to give this Court's ruling only prospective application.

SUMMARY

This Court should hold that the plain language of MCL 600.5827 precludes the application of any common law discovery rule to circumvent the statute of limitations, and give that opinion at least limited retroactive effect.

Respectfully submitted,

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